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IN THE

Supreme Court of the United States

October Term, 1968

No. 784

ARNOLD GEORGE SANDBANK,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Arnold George Sandbank prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 31, 1968.

Citations to Opinions Below

The opinion of the District Court is unreported and is printed in Appendix C hereto, *infra*, pp. 31-42. The opinion of the Circuit Court of Appeals (R. 65) is printed in Appendix C hereto, *infra*, pp. 48-50, and is not yet officially reported.

Jurisdiction

The judgment of the Circuit Court of Appeals (R. 69) was entered on October 31, 1968, and is printed in Appendix C hereto, *infra*, p. 51. The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Questions Presented

1. (a) Whether a Local Selective Service Board must reopen a draft classification for a registrant who files as a conscientious objector, after an induction order was cancelled when entirely new facts are presented and accepted by the Board, and before a new induction order is issued.

(b) Whether the failure to reopen and classify anew and thereby denying registrant his right of appeal is a denial of due process under the Fifth Amendment.

2. Whether there was a denial of procedural due process under the Fifth Amendment where the claims of a registrant for conscientious objector classification was denied by the local board and was not referred to the Department of Justice for inquiry and hearing on appeal under the law then applicable.

3. Whether the Government must prove as an element of the crimes charged that a registrant was called up for induction in proper order.

Statutes Involved

50 U. S. C. App. §456(j)

32 Code of Federal Regulations:

§1622.1	§1625.13
§1625.1	§1631.7
§1625.2	§1631.8
§1625.11	§1632.2
§1625.12	§1632.14

Statement

Petitioner was indicted on three counts alleging that (1) he refused to *submit* to induction into the armed forces on January 3, 1968; (2) he failed to *report* for induction into the armed forces on October 26, 1966; and (3) he failed to *report* for induction into the armed forces on July 26, 1967. All counts were in violation of 50 App. U. S. C. §462(a); 32 CFR §1632.14.

Petitioner was tried before the Honorable Inzer B. Wyatt, United States District Judge, sitting without a jury on April 17, 1968. Decision was reserved until April 24, 1968, at which time Judge Wyatt found petitioner guilty on the first and third counts, and not guilty on Count Two. On June 5, 1968, Judge Wyatt imposed a sentence of three years on each count to run concurrently.

Defendant is presently free on bail by order of Mr. Justice Harlan dated November 18, 1968.

The decision of the District Court held that the Government had not proved beyond a reasonable doubt that the

failure of the petitioner to report for induction on October 26, 1966, was done knowingly, and that an essential element of the offense under 50 App. U. S. C. §462(a), is that the failure to perform a duty be done knowingly. In deciding the remaining two counts upon which petitioner was found guilty, the Court narrowed the issue to "Was the defendant denied procedural due process by the local board?"

The District Court found that petitioner's order to report for induction on October 26, 1966, was not cancelled by his local board even though that notation appears alongside his name on the Delivery List which was Government's Exhibit 139,* and that therefore the notation was meaningless.

It was the Court's opinion that once an order to report for induction is mailed the registrant remains under a continuing duty from day to day to report for induction. That with an outstanding order the local board could not reopen petitioner's classification and could not consider his request for a conscientious objector classification unless it first found that since the mailing of the induction notice there had been a change in the registrant's status over which he had no control. The Court found that the claim for conscientious objector status was raised only after an order to report for induction has been mailed. Reference was made to Section 162[illegible] of the Regulation. The Court also found that if petitioner was a conscientious objector he had been such long before the order to report for induction was mailed. That his claim matured before any induction notice was sent and he had ample time to raise that claim before the induction notice. The District Court held that upon *United States* v. *Geary*, 368 F. 2d

* Exhibits are printed in Appendix B.

144 (2nd Cir. 1966), the failure under these circumstances to re-open and give an appeal right does not deny procedural due process.

The Court below affirmed the decision of the District Court in a *per curiam* opinion holding that petitioner's order to report for induction on October 26, 1966 (2nd count) "was merely postponed rather than cancelled." That petitioner's claim to conscientious objector status matured after the induction notice was issued and that he "failed to make a *prima facie* case demonstrating that he is entitled to reclassification." [1]

The District Court found that the Government had proven that petitioner was not called out of order. The lower court also found that there was adequate evidence to support the finding that petitioner was called in proper order. Disagreeing with the holding in *United States* v. *Lyband,* 279 F. Supp. 74 (E. D. N. Y. 1967) that such affirmative proof is an essential element of the Government's case, it held that the better rule is that the burden is upon the petitioner to show the invalidity of the call-up as part of his defense. The lower court cited *Lowe* v. *United States,* 389 F. 2d 51 (5th Cir. 1968) and *Greer* v. *United States,* 378 F. 2d 931 (5th Cir. 1967).

Reasons for Granting the Writ

Petitioner respectfully submits that certiorari should be granted to resolve recurring questions of denial of procedural due process before local selective service boards; and whether in a criminal case of a draft registrant an essential element of the Government's case is that defendant was called-up in proper order.

---

[1] Petitioner's defense was not to prove to the trial Judge that he was a conscientious objector and offered no evidence on this.

1. Although petitioner was found not guilty on Count Two, failure to report for induction on October 26, 1966, the order to report on that date is of extreme importance in this case. The District Court made no definitive finding that that order was either "Postponed" or "Cancelled". It only held that either notation is "meaningless unless the local board has itself postponed or cancelled, and there was no such action by the local board here". The lower court in a *per curiam* opinion held that "the order was merely postponed rather than cancelled". Both in essence deny the fact that the notation "canc" alongside petitioner's name on the delivery list, Government's Exhibit 139, means just that. Neither Court considered that the second order to report for induction on July 26, 1967, was a new order. Government's Exhibit 17. The second order made no reference to any prior order or continuing order. Under 32 CFR §1632.2 an order to report for induction cannot be postponed for a period longer than 120 days and then only in extraordinary circumstances. The dates between these two orders covered a period of nine months. When there is a postponement a Postponement of Induction (SSS Form 264) is issued to the registrant, a copy sent to the State Director and a copy filed in registrant's Cover Sheet (SSS Form 101). The local board must note the granting of the postponement and the date of its expiration (SSS Form 102). (32 CFR §1632.2 (b)) In a postponed induction situation a new Order to Report for Induction (SSS Form 252) is not issued (32 CFR §1632.2 (c)).

Not one of the foregoing procedural steps were taken by the Local Board clearly indicating that petitioner's induction had been cancelled and not postponed on October 26, 1966. Government's Exhibit 2 further supports this. The notation on the third page under date of October 13. 1966, shows that an induction notice was mailed for Octo-

ber 26, 1966. On the first page there appears the notation that On July 11, 1967, an induction notice was mailed for July 26, 1967.

2. The Local Selective Service Board is required under 32 CFR §1622.1(c) to "receive and consider all information pertinent to the classification of a registrant presented to it". Petitioner filed for conscientious objector classification on December 19, 1966, about two months after his first induction order had been cancelled. At the Board's request he appeared before it and after making a *prima facie* case the Board voted 5 to 1 that it would "go along" with a 1A-O classification. (Government's Exhibit 30). After petitioner notified the Board by letter that he could only accept a 1-O classification Government's Exhibit 28 he was invited to another meeting on June 27, 1967. This time the Board voted not to reopen and reconsider his 1A classification. On July 1, 1967, petitioner filed an appeal (Government's Exhibit 20) which was rejected by the Board. Had his appeal been entertained the matter would have had to be referred to the Department of Justice for inquiry and hearing under 50 App. U. S. C. §456(j). Thereafter petitioner received his second order to report for induction on July 26, 1967 (Government's Exhibit 17).

Petitioner was only required to make out a *prima facie* case before the Board that he was entitled to a new classification. This he apparently was able to do in view of the vote of the Board that it would "go along" with a 1A-O classification. As was pointed out in *U. S.* v. *Zieber,* 161 F. 2d 90, 92 (3rd Cir.) if the registrant furnished:

> new information, the Board was required to classify him as if he had never been classified.

When the Board refused to reopen petitioner's classification it denied him his procedural safeguards of right of

appeal. 32 CFR §§1625.11, 1625.12 and 1625.13. This was a fatal defect. (*U. S.* v. *Strebel,* 103 F. Supp. 628 (1952)).

U. S. v. *Freeman,* 388 F. 2d 246 (7th Cir. 1967).

The court has the power to review those actions of the Local Board when petitioner is denied the constitutional right of due process. *Estep* v. *U. S.,* 327 U. S. 114 (1946); *DeRemer* v. *U. S.,* 340 F. 2d 712 (8th Cir. 1965).

The importance to a registrant of his appeal rights was acknowledged in *U. S.* v. *Stiles,* 169 F. 2d 455, 459 (3rd Cir. 1948):

> . . . in his discussion with the Board members may well clarify in his mind the basis for the Board's action and thus provide him with the relevant material for his statement to the Board of Appeal—this right of appeal after appearance may thus prove of the greatest importance to a registrant.

After petitioner had his second interview with the Board the determination was that petitioner had his convictions long before he received his notice of induction and no new circumstances beyond his control which would compel the Board to recommend cancellation of induction. This determination by the Board is erroneously predicated upon an outstanding notice of induction which had been cancelled. There was no existing notice of induction. What prior notice had been issued was cancelled about eight months earlier and the next one was not until one month later.

Regardless of the phraseology used in the correspondence directed by the Local Board to the petitioner the fact remains that the effect of its action was to deny, on its merits, petitioner's request for classification as a conscientious objector. This was done without affording appellant the right of appeal.

The statute gives the Local Board the authority "to hear and determine, subject to the right of appeal to Appeals Boards," a regsitrant's classification. Section 10(d)(3), 62 Stat. 620 (1948), as amended, 50 U. S. C. App., Section 460 (b) (3) 1964. The Courts have held, and correctly so, that the Local Board may not arbitrarily refuse to reopen, and that in the event the Board does so, the imposition by a court of a sentence is contrary to due process of law.

Olivera v. *U. S.*, 223 F. 2d 880 (5th Cir. 1955);
U. S. v. *Ransom*, 223 F. 2d 15 (7th Cir. 1955).

The most confounding thing is why the Board on April 11, 1967 thought petitioner was entitled to a 1A-O classification, which he refused for a 1-O classification Government's Exhibit 28, and two months later changed its opinion.

In *Franks* v. *U. S.*, 216 F. 2d 266 (9th Cir. 1954) the court reversed a conviction and held that it was not for the local board to say that registrant should not be placed in class 1A-O merely because he did not want such classification or was seeking classification 1-O or would probably refuse to acquiesce in the 1A-O classification.

Petitioner is not precluded by the law in *U. S.* v. *Geary*, 379 F. 2d 915 (2nd Cir.). In that case the board had found the registrant was insincere in his application for a conscientious objector classification and that he had filed while an induction order was pending. Petitioner's sincerity was not doubted by his Board nor was there an outstanding induction order.

The law has been firmly established that when a registrant makes a *prima facie* showing for a desired classification the Board may not deny that classification. *Dickinson* v. *U. S.*, 346 U. S. 389; *Estep* v. *U. S., supra; United States* v. *Ransom, supra.*

In *Townsend* v. *Zimmerman*, 237 F. 2d 376 (6th Cir. 1956) an injunction against induction was sustained. In that case the Board had voted 2-1 not to reopen a classification and to draft registrant. The Court considered the vote a reopening of the case and registrant's appeal rights were preserved.

3. Petitioner filed his application for a conscientious objector classification on December 19, 1966. The denial by the Local Board to reopen petitioner's classification precluded any inquiry and hearing by the Department of Justice under 50 U. S. C. §456 (j) which was then applicable. This investigation would have afforded petitioner an opportunity to contradict the findings and some protection. See e.g., *United States* v. *Nugent*, 346 U. S. 1 (1953); *Storey* v. *U. S.*, 370 Fed. 2d 255 (9th Cir. 1966); *U. S.* v. *Corliss*, 280 F. 2d 808, 810 (2nd Cir., cert. denied 364 U. S. 884 (1960)); *Bialock* v. *U. S.*, 247 F. 2d 615, 619 (4th Cir. 1957).

Also: *Sterrett* v. *U. S.*, 216 F. 2d 659.

As the Court stated in *Olivera* v. *U. S.*, *supra*, at page 882:

> . . . strict compliance with every procedural requirement is essential to the board's jurisdiction and the validity of its orders.

4. Petitioner argued before the trial judge and in the lower court that the government failed to prove as an element of the crimes charged that he was called up for induction in proper order. 32 CFR §1631.7.

The Government made a weak gesture to prove call-up with a witness from a local board with which petitioner was not registered.[2] The witness' testimony was:

---

[2] Petitioner was registered with Local Board No. 23, but the witness was a clerk with Local Board No. 20.

> Q. Now, can you tell from that list whether or not Mr. Sandbank was ordered in the regular course of the registrants at your board for induction? A. He was ordered pretty late.
>
> Q. Would you explain that, please? A. We reached the boys born in 1947 by this time.

The lower court was of the view that the better rule is to require the registrant to show that the call-up was invalid as part of his defense with the right of the government to rebut such evidence. *Lowe* v. *U. S., supra; Greer* v. *U. S., supra.* The footnote in the *per curiam* opinion states that the court hesitates to "presume a vital element of the proof, applying the presumption here results in merely permitting the Government to present its case in chief free of a technical nicety". The lower court analogizes this situation with a defense of insanity.

In *Greer* v. *U. S., supra,* no objection to the call-up was raised in the lower court, and *Lowe* v. *U. S., supra,* relied upon *Greer.*

What the government must prove to make a *prima facie* case is not the same as a defense. It is an essential element of the crime charged that petitioner was called up in due order. The burden was on the defendant, if the proof was offered, to then go forward and prove the contrary. It is incumbent upon the prosecution in a criminal case to prove defendant's guilt beyond a reasonable doubt. The evidence was within the control of the government and should have been offered as proof. *Morissette* v. *U. S.,* 342 U. S. 246 (1952); *U. S.* v. *Tot,* 319 U. S. 463, 469-70 (1943).

In *Franks* v. *U. S., supra,* page 269, the court held that the burden is upon the Government to establish the validity of the induction order.

In *U. S.* v. *Lyband, supra,* the court held that it was a necessary part of the Government's case to prove proper call-up and refused to allow the Government to reopen the case to cure the failure to prove same. The same holding was made in *U. S.* v. *Franklin Howard Rhodes,* Crim. No. 41,112 (N. D. Cal., unreported).

B cause of the conflicting opinions on this very important point of law it would appear necessary for this Honorable Court to finally decide this issue.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY FAULKNER,
Counsel for Petitioner.

APPENDIX A

Statutes Involved

50 U. S. C. App. §456(j):

> ". . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix].
>
> (k) . . .

Statutes Involved

32 CFR §1622.1

1622.1 General Principles of Classification.—(a) (1) Primary liability for military training and service provided by the selective service law is placed on those persons in the following categories who are between the ages of 18 years and 6 months and 26 years:

(i) Every male citizen of the United States;

(ii) Every male alien admitted to the United States for permanent residence; and

(iii) Every male alien who has remained in the United States in a status other than that of a permanent resident for a period or periods totaling one year.

(2) Persons who on June 19, 1951, or thereafter were deferred under the provisions of section 6 (c) (2) (A) of the Act that were in effect prior to September 3, 1963, remain liable for training and service until they attain age 28.

(3) Persons whose liability for training and service is extended by the Act to age 35 are:—

(i) persons in a medical, dental or allied specialist category, and

(ii) persons who on June 19, 1951, were, or thereafter are deferred under any other provisions of section 6 of the Act.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Military Selective Service Act of 1967, in which the Congress has declared "that in a free society the obligations and privileges of serving in

the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class 1-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

REOPENING REGISTRANT'S CLASSIFICATION

1625.1 Classification Not Permanent.—(a) No classification is permanent.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government

appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

32 Code of Federal Regulations

1625.11 Classification Considered Anew When Reopened.—When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.12 Notice of Action When Classification Considered Anew.—When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof

on Notice of Classification (SSS Form 110) to the registrant and on Classification Advice (SSS Form 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

1625.13 Right of Appeal Following Reopening of Classification.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1631.7 Action by Local Board Upon Receipt of Notice of Call.—(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction: *Provided,* That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And Provided further,* That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless

of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the Oldest being selected first, or (B) have a wife whom they married after the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order.

(b) When a call is placed with designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and who have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction; *Provided,* That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62); *And provided further,* That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Registrants in the designated age group; and registrants who previously have been deferred in Class I-S-C after attaining the age of 19 years, or who have requested and have been granted a deferment in Class II-S after the enactment of the Military Selective Service Act of 1967, and who are no longer so deferred, shall be considered as being within the age group called regardless of their actual age. These registrants shall be integrated and called according to the month and day of their birth, the oldest first. Registrants who have been deferred in Class I-S-C or Class II-S and have been integrated with a prime age group under the provisions of this paragraph shall, for the purposes of selection and call, thereafter be considered a member of such age group.

(c) Whenever the number of postponements of induction materially reduces the number of men the local board actually can deliver in response to a call, the local board shall issue orders to report for induction to such numbers of additional men as may be necessary to meet the call, taking into account the number of men to be delivered following the expiration of postponements previously granted.

1631.8 Registrants Who Shall Be Inducted Without Calls.—(a) Notwithstanding any other provision of the

regulations in this chapter, any registrant enlisted or appointed after October 4, 1961, in the Ready Reserve of any reserve component of the Armed Forces (other than under section 511(b) of title 10, United States Code), the Army National Guard, or the Air National Guard, prior to attaining the age of 26 years, or any registrant enlisted or appointed in the Army National Guard or the Air National Guard prior to attaining the age of 18 years and 6 months and prior to September 3, 1963, and deferred under the provisions of section 6(c) (2) (A) of the Military Selective Service Act of 1967, which were in effect prior to September 3, 1963, or any registrant enlisted in the Ready Reserve of any reserve component of the Armed Forces prior to attaining the age of 18 years and 6 months and prior to August 1, 1963, and deferred under section 262 of the Armed Forces Reserve Act of 1952, as amended, who fails to serve satisfactorily during his obligated period of service as a member of such Ready Reserve or National Guard or the Ready Reserve of another reserve component or the National Guard of which he becomes a member as certified by the respective armed forces, shall be ordered to report for induction by the local board regardless of the class in which he is classified and without changing his classification. Any registrant who is ordered to report for induction under this paragraph shall be forwarded for induction at the next time the local board is forwarding other registrants for induction or at any prior time when special arrangements have been made with the induction station, without any calls being made for the delivery of such registrants. Whenever the local board desires to deliver such a registrant specially, it shall request the State Director of Selective Service to make the special arrangements for the time and place at which the registrant may be delivered for induction.

Statutes Involved

1632.2 Postponement of Induction—General.—(a) In case of death of a member of the registrant's immediate family, extreme emergency involving a member of the registrant's immediate family, serious illness of the registrant, or other extreme emergency beyond the registrant's control, the local board may, after the Order to Report for Induction (SSS Form 252) has been issued, postpone the time when such registrant shall so report for a period not to exceed 60 days from the date of such postponement, subject, however, in cases of imperative necessity, to one further postponement for a period not to exceed 60 days; and provided also, that the Director of Selective Service or any State Director of Selected Service (as to registrants registered within his State) may, for a good cause, at any time prior to the issuance of an Order to Report for Induction (SSS Form 252), postpone the issuance of such order until such time as he may deem advisable, or the Director of Selective Service or any State Director of Selective Service (as to registrants registered within his State) may, for good cause, at any time after the issuance of an Order to Report for Induction (SSS Form 252), postpone the induction of a registrant until such time as he may deem advisable, and no registrant whose induction has been thus postponed shall be inducted into the armed forces during the period of any postponement.

(b) The local board shall issue to each registrant whose induction is postponed a Postponement of Induction (SSS Form 264), shall mail a copy of such form to the State Director of Selective Service, and shall file a copy in the registrant's Cover Sheet (SSS Form 101). The local board shall note the date of the granting of the postponement and the date of its expiration in the "Remarks" column of the Classification Record (SSS Form 102).

(c) Any period of postponement authorized in paragraph (a) of this section may be terminated before the date of its expiration when the issuing authority so directs and the registrant shall then report for induction at such time and place as may be fixed by the local board.

(d) A postponement of induction shall not render invalid the Order to Report for Induction (SSS Form 252) which has been issued to the registrant but shall operate only to postpone the reporting date and the registrant shall report on the new date without having issued to him a new Order to Report for Induction (SSS Form 252).

INDUCTION

1632.14 Duty of Registrant to Report for and Submit to Induction.—(a) When the local board mails to a registrant an Order To Report for Induction (SSS Form 252) or an Order for Transferred Man To Report for Induction (SSS Form 253), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. It the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

APPENDIX B

Government's Exhibit 2, Selective Service System— Minutes of Action

(Mounted opposite)

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

Appeal not required. 2

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR SR NUMBER			
SANDBANK, ARNOLD GEORGE	50	23	42	544

Dates	Minutes of Actions	Vote Yes	Vote No
6-5-69	Ltr rec'd fr reg's Mother - reg will not be able to attend P.B. mtg.		
6-19-67	JUN 27 1967 Ltr rec'd fr reg requesting		
6/27/67	Ltr rec'd, do not transfer reg	X	O
6-29-67	Ltr 59 mld to reg.		
7/5/67	Ltr rec'd from reg. Appealing classification.		
JUL 11 1967	INDUCTION NOTICE MAILED 7/26/67		
7/11/67	Ltr to reg. re; ltr appealing class.		
7-19-67	Ltr rec'd from reg re: current status		
7/16/67	HA granted		
7/18/67	See Memos in file.		
7/20/67	See Memo in File.		
7/20/67	Ltr to reg to report for Induction. Advised not entitled to appeal.		
7/26/67	File returned from Hdq. with copy of letter to reg.		
7-31-67	[illegible] for induction		
7/31/67.	Entered on 302. See memo in file. File fwd to HQTRS		
9/1/67	File rec'd from Hdq. Authorised to report on 301.		
9/13/67	Registrant report on 301		
10-16-67	See Memo in file. File fwd to HQTRS		
[illegible]	[illegible]		

To be used to provide additional pages of the Standby Reserve Questionnaire (SSS Form 80) or Classification Questionnaire (SSS Form 100) when more space is required for recording minutes of actions.

SSS Form 99 (12-30-61)

GPO 863-773

GOVERNMENTS EXHIBIT U.S. DIST. COURT S.D. OF N.Y.

Approval not required.

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

NAME OF REGISTRANT OR STANDBY RESERVIST	SS OR SR NUMBER
SANDBANK, ARNOLD G.	50 23 45 51[illegible]

Dates	Minutes of Actions	Vote Yes	Vote No
11/7/66	See report of oral information this date.		
11/[illegible]/66	Reg advised he must appear for induction on 11/23/66.		
11/18/66	See report of oral information this date.		
11/21/66	Mother of reg submitted copy of receipt of appeal letter, which she stated was submitted prior to ~~clase~~ issuance of order to report for ind. See memo of information this date.		
11/21/66	See report of oral information this date.		
11/22/66	See telegram rec'd from reg.		
11/22/66	See memo this date.		
11/22/66	See ltr mailed to reg spec delivery.		
11/25/66	Reg. appeared at LB -see statement- claims Conc. Object. and requests F 150.		
11/30/66	Listing rec'd - reg AU on Induction.		
12/9/66	F 150 (Spec.F for C.O) mld. to reg.		
12/14/66	See ltr rec'd from exam sta rel to return of reg.		
12/16/66	See report of oral information this date.		
12/19/66	Rec'd, completed F 150		
1/[illegible]/67	Rec'd. req. from reg. for personal appearance.		
1/10/67	Records rec'd. from AFEES in error		
1/12/67	Records returned to AFEES for correction and completion.		
1/16/67	Corrected records received from AFEES.		
1/17/67	DD F 62 mld to reg. QUALIFIED 1/6/67.		
1/19/67	File,cover sheet and contents forwarded to NYC Hdqts.		
4/5/[illegible]	Letter mailed for interview 4/11/[illegible] 7:00 P.M. [illegible]		
[illegible]	[illegible]		
4/10/[illegible]	[illegible]		
[illegible]	[illegible]	[illegible]	[illegible]
4/[illegible]	[illegible]		
[illegible]	[illegible]		
[illegible]	[illegible]		
5/[illegible]	ltr to reg to report for interview on 6/6/67		

To be used to provide additional pages of the Standby Reserve Questionnaire (SSS Form No. 86) or Classification Questionnaire (SSS Form No. 100) when more space is required for recording minutes of actions.

(Other Forms No. SSS 101-20-66)

☆ U.S. GOVERNMENT PRINTING OFFICE : 1966—O-[illegible]

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Vote Yes	Vote No
DEC 11 1963	SSS F 2 mld to reg.		
5/6/65	F 127 mld.		
5/21/65	F 127 rec'd - no change.		
JUN 2 1965		4	0
JUN 3 1965	FORM 110 MAILED		
SEP 7 1965	SSS FORM NO. 223 MAILED SEP 28 1965		
OCT 5 - 1965	DD FORM No. 62 MAILED NOT QUALIFIED M7 & 88 to Med Div		
10/26/65		7	0
OCT 27 1965	FORM 110 MAILED		
MAR 16 1966	SSS FORM NO. 127 MAILED		
3/21/66	F 127 rec'd - no change.		
5/4/66	Pre notice mld for 5/18/66.		
5/21/66	Papers rec'd. F 62 mailed - Qualified.		
5/27/66	Addl medical evidence submitted.		
5/27/66	Appeal filed by registrant on recl due to medical		
6/7/66	Forwarded as Papers Only Case.		
6/14/66		5	0
JUN 15 1966	SSS FORM NO. 110 MAILED		
8/11/66	Papers rec'd. Form 62 mailed - Qualified.		
9/26/66	Facts do not warrant reopening 1-C	X	0
SEP 21 1966	SSS FORM NO. 110 MAILED		
10/13/66	Induction notice mailed for 10/26/66.		
10/27/66	See trans memo with attachments rel to registrant.		
11/1/66	Papers rec'd. - reg failed to appear for ind 10/26/66.		

(Continue on Page 7)

Government's Exhibit 17, Order to Report for Induction Dated July 11, 1967

(Emblem)

Approval Not Required.

SELECTIVE SERVICE SYSTEM
ORDER TO REPORT FOR INDUCTION

Selective Service System
Local Board No. 23
881 Gerard Avenue
Bronx, New York 10452
Jul 11 1967

Selective Service No.
50 23 45 544

The President of the United States,
To

Mr. Arnold George Sandbank
2593 Sedgwick Avenue
Bronx, New York 10468

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report at Armed Forces Examining Station 39 Whitehall Street, New York, N. Y. Room 204 on Jul 26 1967 at 7 A.M. for forwarding to an Armed Forces Induction Station.

N. L. HOCHBERG

(Member or clerk of Local Board)

Government's Exhibit 20, Letter Dated July 1, 1967 From Arnold George Sandbank to Selective Service System

2593 Sedgwick Avenue
Bronx, 68, New York
July 1, 1967

Selective Service System
Local Board No. 23
881 Gerard Avenue
Bronx 52, New York

Re: Arnold George Sandbank
ID # 50 23 45 544

To Whom It May Concern:

I hereby serve notice that I am appealing your decision classifying me as 1A.

Signed,

ARNOLD GEORGE SANDBANK

Government's Exhibit 28, Letter From Arnold George Sandbank to Selective Service Board

2593 Sedgwick Avenue
Bronx, N. Y. 10468

Selective Service System
Local Board
881 Gerard Avenue
Bronx, N. Y.

Re: Arnold George Sandbank
Selective Service #50-23-45-544

Gentlemen:

After leaving the hearing at the local draft board, and being given the alternative of being classified 1-A-O, I returned home and gave the matter deep thought. I learned that this classification holds the probability of my having to engage in activities of military nature. I have been informed that the classification could require me to go to a combat area and work directly in the armed services; thereby directly assisting the military effort.

This runs completely counter to my religious and philosophical training since childhood, in both my church and home, we have all concluded this is a question for individual conscience, and my conscience refuses to accept this classification.

At this point I wish to thank the gentlemen who were present at my hearing for their understanding of my attitude. I would not object to participate in work of a completely nonmilitary nature. It is not a question of disarranging my life, but of being true to my deepest beliefs.

Again thanking you for your consideration, I am

Very truly yours,

ARNOLD GEORGE SANDBANK

Government's Exhibit 30, Summary of Interview of April 11, 1967

(Mounted opposite)

Selective Service System
LOCAL BOARD NO. 23
981 Gerard Avenue
Bronx, New York 10452

(Local Board Stamp)

GOVERNMENT'S EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
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SUMMARY OF: ( ) PERSONAL APPEARANCE (xx) INTERVIEW (CHECK ONE)

At a meeting of the Local Board held on April 11, 1967 the registrant,

SANDBANK, ARNOLD GEORGE (Name) 50 23 45 544 (Selective Service No.)

appeared before a Member or Members of this Local Board and submitted the following new information: - Registrant appeared with his Pastor Bethlehem Baptist Church + his employer Reg. states he is opposed to killing + that he is Conscientious opposed to taking a life. It is not connected with any religious belief. He says he received this in last year. Board explained 1A-O Classification. He said he did not know this and is willing to serve in a non combatant capacity. He will go to Headquarters to-morrow + withdraw C and request be 1A-O. Registrant + Pastor to be notified by mail.

Member's Signature

Member's Signature

Member's Signature

Member's Signature

Member's Signature

Member's Signature

Member's Signature

SSS-NY City
Form No. 3
(Revised 8/22/62)

Government's Exhibit 139, Delivery List, October 26, 1966

(Mounted opposite)

Selective Service System
LOCAL BOARD NO. 23
881 Gerard Avenue
Bronx, New York 10452

(Local Board Stamp)

Approval not required.

SELECTIVE SERVICE SYSTEM

Sheet No. 1 of 3 sheets

DELIVERY LIST

Oct 26, 1966 - 7:00 A.M.
(Date of delivery)

(People in Quintuplicate) Selective Service Call No. 196
LOCAL BOARD NO. 23 Induction
Period Oct, 1966
(Month)

NOV 1 1966

To: COMMANDING OFFICER, ARMED FORCES INDUCTION STATION, 501 Bergen, New York 10455

The registrants herein listed, except as otherwise noted, have been selected for service by this local board and were forwarded on 10/26/66 (Date) by (Means of Travel) to report to you for induction.

Number called for	38	Number listed on transfer in	0
Number listed from this board	13	Total number forwarded	10

GOVERNMENT EXHIBIT
U. S. DIST. COURT
E. D. OF N. Y.
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	(1) Selective Service No.				(2) Name (Last)	(First)	(Middle Initial)	(3) Not Previously Found Qualified	(4) Disposition: Induction: Army	Navy	Air Force	Marine Corps	Rejected/Not Qualified	Failed To Report	Held Over	(5) Remarks
1	50	23	44	107	Atkin	Neal J.										Cancelled
2	V50	23	43	444	Foster, Jr.	Paul H.		X	X							
3	V50	23	46	704	Howe	John J.		X					X			
4	V50	23	47	220	Rivera	Hector [illegible]			X							
5	V50	23	47	272	Foley	James D.		X							X	AI, ED
6	50	23	42	108	Rachlin	Alan			X							
7	50	23	42	524	Lipton	Alan			X							
8	50	23	42	648	Hochreiter	Heinrich [illegible]								X		Transferred.
9	50	23	43	498	Kelly	Malachy F.										11/23/66
10	50	23	44	103	Cohl	Arthur [illegible]										1/67 Ind Call
11	50	23	45	418	Likeness	Ralph S.										11/23/66
12	50	23	45	524	Sandbank	Arnold G.										
13	50	23	47	29	Simon	Howard L.			X							
14	50	23	47	106	Rogers	Gerard A.			X							
15	50	23	47	120	Greco	Matthew [illegible]			X							
						Totals (Enter on last sheet only)		10	7			1		1	1	

Oct 13, 1966
(Date of preparation)

(Signature of clerk or officer of local board)

JAMES J. MC POLAND
(Signature of C. O. AFES)

LTC INF
(Grade and organization)

28 OCT 1966
(Date of return to local board)

SSS Form No. 261 (Revised 2-22-62)
(Printing of 2-12-62 may be used)

APPENDIX C

Opinion of District Court

(194)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

New York, N. Y.
April 24, 1968—10:15 p. m.

Before

HON. INZER B. WYATT,
District Judge.

Appearances:

ROBERT M. MORGENTHAU, Esq., United States Attorney for the Southern District of New York. John R. Robinson, Esq., Assistant United States Attorney.

STANLEY FAULKNER, Esq., Attorney for Defendant.

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The Court: Now, the decision of the Court after trial: I have my notes here, and I will dictate it to the stenographer.

To take the second count first, out of order, I find the defendant not guilty on this second count, because the Government has not proved to my satisfaction beyond a reasonable doubt that the admitted failure of the defendant to report for induction on October 26, 1966 was done knowingly, and an essential element of the offense under 50 Appendix, United States Code, Section 462(a), is that the failure to perform a duty be done knowingly.

As to the other two counts, the situation is very different. There are not really any issues of fact as to Counts 1 and 3. The sole defense is, as put at pages 10 and 11 of the very able trial memorandum for defendant, that, and I quote, "Defendant was not provided the procedural due process provided by the Selective Service Act" and that this is "sufficient for a judgment of acquittal".

If procedural due process was denied defendant by the local board, then I would agree, at least for the purposes of this case, that there should be a judgment of acquittal. The issue, then,

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narrows to this: Was the defendant denied procedural due process by the local board? The facts and the law as to this issue appear to be as follows:

The defendant was born November 30, 1945. On December 3, 1963, he registered with Local Board 23 of the City of New York. This local board was in the Bronx, where the defendant lived. On December 12, 1963, defendant signed a classification questionnaire called Form 100. On this form there is a section for use by conscientious objectors and in which request can be made for Form 150 to be executed by all registrants claiming to be conscientious objectors. At the head of this section, which is Series VIII, are the words, printed in block letters, "CONSCIENTIOUS OBJECTOR". Alongside those two words, defendant placed in ink the word "None" and did not sign the claim to be a conscientious objector, nor did he request Form 150.

On June 2, 1965, defendant was classified by the local board as 1-A. A notice of classification on a form called Form 110 was mailed to defendant on June 3, 1965. There is a right of appeal within the selective service system from

the classification of a local board. That is provided for by 32 CFR

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1626.2(a). No appeal was taken by defendant from the classification.

On September 7, 1965, defendant was directed by the local board to appear on September 28, 1965, at 39 Whitehall Street for a physical examination. He then obtained a certificate from Dr. Silver, who had treated him for hyperthyroidism, but had not seen him since January 1963 and who understood that most of his symptoms had cleared.

Defendant appeared on September 28th for physical examination, told of Dr. Silver's treatment and was found not acceptable for induction because of hyperthyroiditis, active.

On October 26, 1965, defendant was reclassified 1-Y by the local board, meaning that he was not currently qualified physically for service. A notice of classification, Form 110, was mailed to defendant on October 27, 1965.

On May 4, 1966 another direction to appear on May 18th at 39 Whitehall Street for a physical examination was mailed by the local board. On May 18, 1966, defendant did appear for examination and was then found acceptable. A statement of acceptability on a form called Form 62 was mailed to defendant under

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date of May 18, 1966. Another certificate was then obtained from Dr. Silver, and under date of May 26 1966 defendant wrote to the local board, notifying them, the local board, that he was appealing his reclassification of 1-A for medical reasons. At May 26th there had not been any reclassification, but on June 14, 1966 defendant was reclassified by

the local board as 1-A. A notice of classification on the same form, Form 110. was mailed on June 15, 1966. Again, there was a right of appeal within the selective service system, but no appeal was taken by defendant.

On August 3, 1966 still another physical examination was conducted at 39 Whitehall Street. Doubtless, this August 3rd examination was in response to the defendant's May 26th appeal, so-called, for medical reasons. At any rate, on August 3rd, the examining station at 39 Whitehall Street found defendant acceptable.

On September 20, 1966 the local board decided that the medical evidence did not warrant a re-opening of the classification. The local board docket minutes show that on September 21, 1966, a notice of classification on the same form, Form 110, was mailed to defendant. This may not have been required, but in

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any event it appears to have given another right to appeal within the selective service system, but no appeal was taken.

On October 13, 1966 an order to report for induction—this is Form 252—was mailed by the local board, directing defendant to report for induction on October 26th. Defendant failed to report for induction on October 26th. The failure to report for induction on October 26th is the subject of the second count, as to which the defendant has been acquitted, largely because of the doubt that he may have believed that because of efforts through the Surgeon General and through Mr. Bingham, a Congressman in the House of Representatives, he would have another medical examination and was not obliged to report for induction.

In any event, the station at 39 Whitehall Street again, undoubtedly because of the efforts through the Surgeon General and Mr. Bingham, arranged for him to receive an examination at the United States Naval Hospital at St. Albans on November 21, 1966.

In reference to the efforts mentioned, through the Surgeon General and Mr. Bingham, it should be noted that some time before October 26th the

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defendant's mother had written to the Surgeon General, and the matter had been taken up with Congressman Bingham in Washington.

The point made by Mrs. Sandbank was that the system was about to induct her son by ignoring the medical evidence of a hyperthyroid condition, and a certificate from Dr. Klein was submitted along with another certificate from Dr. Silver.

The defendant did report to St. Albans on November 21, 1966 and was found at the United States Naval Hospital, after tests for hyperthyroidism, to be doing well and with no abnormal thyroid condition. However, one of the tests could not be completed on November 21st, due to the defendant's vomiting the test material, and he was directed to report at St. Albans for a further thyroid test on November 28th.

Meanwhile, on November 15, 1966 the local board had notified defendant to report for induction on November 23, 1966. On November 21st, defendant, after having had the examinations at St. Albans, sent a telegram to the local board, advising of his examination at St. Albans and asking them to postpone the date of his induction until results were confirmed. The local board then reviewed the matter and wrote

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defendant to report for induction on November 23rd as ordered. The defendant did report at 39 Whitehall Street on November 23rd, but doubtless because of his statement about his incomplete St. Albans thyroid examination, he was not required to submit to induction but was described as A. U., understood by me to mean "Acceptability Undetermined", and the induction record was marked "Held Over".

Thus it was that on November 25, 1966 defendant appeared at the office of Local Board 23 and filed a written statement, in evidence here as Exhibit 42, that he had reported to 39 Whitehall Street on November 23rd but had been marked a medical holdover, because no report had been received from St. Albans. His written statement of November 25th then continued:

> "I now wish to receive Form No. SSS-150 on the grounds that I now consider myself to be a C.O."

The local board then sent a form, Form 150, the conscientious objector form, to defendant. Meanwhile, the medical staff was trying to get defendant back to St. Albans to complete his test, and defendant was ordered by the local board to report to St. Albans

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on December 19, 1966. On December 19, 1966, defendant did report to St. Albans to complete his thyroid tests, which were completed and showed normal range and that defendant was fit for induction. On the same day, December 19, 1966, Local Board 23 received the completed Form 150 for conscientious objectors, which had been signed by the defendant. This form claimed exemption from both

combatant and non-combatant training and service by reason of religious training and belief.

In response to the question, how, when and from whom he received the training which was the basis of his claim to be a conscientious objector, the defendant stated, among other things, that he had attended parochial school for ten years and had been baptized as a Lutheran. Whatever the content, the training, according to the defendant, was long before receipt by him of the order to report for induction.

On January 3, 1967, Local Board 23 received from defendant a request for personal appearance in connection with his conscientious objector claim. Local Board 23 then saw defendant and his sister and his employer on April 11, 1967 for the personal appearance which had been requested. According to the

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minutes of the local board, defendant stated that his beliefs as a conscientious objector were not connected with any religious belief. As a matter of law, therefore, this statement established that defendant was not entitled to classification as a conscientious objector, because that classification depends, according to the statute, on religious training or belief.

The local board's minutes, showing the result of the April 11th meeting, are in evidence as Exhibit 30. They are not in technically precise form, but it is clear that the local board applied the Regulation 32 CFR 1625.2 and refused to re-open the classification of defendant for the reason that there was no change in the status of defendant from circumstances over which he had no control, which is the only basis on which the local board could itself re-open a classification after the order to report for induction had been mailed. However, the board explained the classifica-

tion, that is, at the April 11th meeting, the classification 1-AO, which is that of a conscientious objector who is willing to do military service in a non-combatant capacity. Defendant indicated that he would accept such a classification, and the minutes indicate that the board then advised him to go to the

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State Director. The reason for this was that if the State Director saw fit, then the State Director could, under Regulation 32 CFR 1625.3, direct the local board to re-open, and this would enable the local board to re-open and to consider a classification such as 1-AO.

Whatever may have been the situation, defendant did not go to the State Director, because on April 17th the local board received a letter from him refusing the 1-AO because, and contrary to his earlier statement, it ran counter to his religious training. At the same time, defendant stated that this training had been since childhood and thus, if he had had conscientious objections, these had matured long before the order to report for induction was issued.

After receipt of the letter from the defendant on April 17, 1967, the local board again permitted defendant personally to appear before the board, which he did on June 27, 1967, when his mother and sister also attended. After this appearance on June 27, 1967, the local board recorded that defendant stated that his feelings were not affected by religious training or belief as a really important factor and that he had had his feelings since he was seven years old.

The board found that the defendant was

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sincere, but was not entitled to a conscientious objector classification and that even if he were, arguably, so entitled,

the regulation I have already cited, 32 CFR Section 1625.2, forbade the local board to re-open his classification, because his conscientious objector feeling had matured long before the order of induction and, therefore, did not constitute a change in his status over which he had no control.

On June 29, 1967, the local board mailed defendant a letter notifying him that there would be no re-opening and no reconsideration.

On July 1st defendant notified the local board that he was appealing the decision "classifying me as 1-A". The decisions classifying the defendant as 1-A were on June 2, 1965 and June 14, 1965 and were then appealable, but no appeal was taken.

A notice of 1-A classification, as has been seen, was sent defendant on September 21, 1966. This enabled an appeal to be then taken, but no appeal was in fact taken.

The decision of the local board on June 27, 1967 was not a classification but was a refusal to re-open and reconsider classification. There is no appeal from such a decision. The only appeal within

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the selective service system for a registrant is from a classification, such as provided in Regulation 32 CFR 1626.2(a) and is noted with emphasis in United States v. Freeman, 388 FF. 2nd 246, at 249, a recent decision of the Seventh Circuit Court of Appeals.

Defendant was given notice to report for induction on July 26, 1967. He did not so report, as is conceded. On January 3, 1968, the defendant reported to the induction station at 39 Whitehall Street, where he was given the preliminary tests for acceptability, including physical examination. It was noted, "No thyroid palpable", which I take to mean that there was no evidence of a thyroid condition. Defendant was found acceptable. He then refused to submit to induction, as is conceded.

The only authority which can postpone induction or cancel an order to report for induction is the local board. If some person other than a local board makes a notation, "Postponed" or "Canceled", the notation is meaningless unless the local board has itself postponed or canceled, and there was no such action by the local board here.

Assuming at this point that Judge Weinstein's decision in United States v. Lybrand in the Eastern

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District, the index number in the Eastern District being 67 Cr. 275, is good law—and as to that I express no opinion —the Government did prove here that defendant was not called for induction before others out of order, but rather that he was called later than others registering at or about the same time.

Once an order to report for induction is mailed, the registrant remains under a continuing duty from day to day to report for induction. With an order to report for induction outstanding, the local board could not re-open defendant's classification and could not consider his request for a conscientious objector classification unless it first found that since the mailing of the order, the induction notice, there had been a change in the registrant's status over which he had no control.

The local board found that there had been no such change in status. The important point is that the claim to conscientious objector status was raised only after an order to report for induction had been mailed. Section 1625.2 of the Regulation is applicable.

The only evidence before the board showed,

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and all the evidence here showed that if defendant is a conscientious objector within the relevant statute, he has

been such since long before the order to report for induction was mailed. His claim matured before any induction notice was sent, and he had ample time to raise that claim before the induction notice.

Under such circumstances, our Court of Appeals has ruled that failure to re-open and give an appeal right does not deny procedural due process. That is the first Gearey case, 368 F. 2nd 144, at page 149.

Reliance by defendant on the Freeman case in the Seventh Circuit, cited a moment ago, is misplaced. In Freeman the claim for conscientious objector status was filed after Freeman had been classified 1-A but long before there had been any order to report for induction. The refusal of the local board to re-open Freeman's classification was not governed in any way by the proviso in Section 1625.2 applicable only to requests to re-open after issuance of an order to report for induction.

The Freeman case and this case at bar are, in my opinion, as different as night from day.

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The defendant is therefore found guilty on Counts 1 and 3.

Does the Government have any suggestion as to the date for sentence?

Mr. Robinson: Your Honor, first, the Government would like to apologize for not being here before. I was before Judge Tenney, and I didn't expect to be held over.

As to the date for sentence, Probation takes about a month or a little longer than a month, because they say they have a heavy load. They told me that just now in the other courtroom. About six weeks?

The Court: Mr. Sandbank, I will fix Wednesday, June 5th, at ten o'clock in the morning as the date for sentence. I believe we will be in this room, but I am not quite sure.

In any event, we will let you know, both by announcement in the Law Journal and by notifying Mr. Faulkner.

The reason that we are postponing the sentence is because in fixing any sentence, we like to have as much information as we can about the family background, the education, the prior experience, everything that good probation officers can develop

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which will assist the Court in determining the fairest and most just sentence both as respects the defendant and also, of course, as respects the public.

Mr. Faulkner, I would ask that you be good enough to see that Mr. Sandbank goes to the Probation Office before he leaves the building.

Mr. Faulkner: Yes, sir.

The Court: Now, Mr. Robinson, what is the custody status of Mr. Sandbank?

Mr. Robinson: Your Honor, he is out on bail at the moment. I don't know the exact amount of the bail.

Mr. Faulkner: $2,500.

The Court: Does the Government have any objection to his remaining in that status?

Mr. Robinson: Yes, it does, your Honor. Mr. Sandbank, as I told your Honor, was ordered for induction in July, and in September or November of 1967, he was contacted by the FBI, and he was asked if he would go for induction. He said he would, but he would like to spend Christmas with his parents, at least, here in New York City. He then proceeded to go to Florida for Christmas vacation, and his attorney and Mr. Sandbank himself, either by reference

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or directly, promised that he would go down for induction the 3rd of January 1968, and "for induction" were

his words; he did not say "submit", but I took it for induction. We refrained from arresting Mr. Sandbank. Instead, your Honor, he went down to the induction station. He refused to submit to induction, and he caused a demonstration in front of this Courthouse.

I do not consider Mr. Sandbank trustworthy to remain outside the jurisdiction of this Court.

The Court: Mr. Faulkner?

Mr. Faulkner: If your Honor please, I can only repeat what I said before the Commissioner when Mr. Sandbank was brought before the Commissioner. I think Mr. Robinson is piqued, because when we came before the Commissioner he asked for $20,000 bail. And what is this I am referring to? Sandbank told Mr. Robinson that he was going to consider reporting for induction. I called Mr. Robinson, and I suggested over the phone that we fix the date, and we did, January the 3rd as the date. I said, "I do not know whether Mr. Sandbank will submit to induction or not".

I then had a conference with Mr. Sandbank, and he told me he would not. I said, "Report, but if

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you want to follow the administrative steps, then of course you do not submit at that point. But this is your decision".

He was not arrested on January 3rd. He voluntarily appeared on January 3rd by appointment with both Mr. Robinson and the FBI agent, and he went down; he went through his physical, as your Honor related in your decision, and then he refused to take the step forward.

Mr. Sandbank has responded every time he has had to appear before this Court.

The Court: Well, he is in much worse trouble if he doesn't show up, because of the ease of proving a bail-jumping charge.

Mr. Faulkner: Very easy, and, as your Honor probably will appreciate, there will be an appeal taken on this case, and it certainly would not behoove the defendant to do anything that would jeopardize both the probation report and our appeal. So that I see no problem here whatsoever, if your Honor pleases, and I say this because I myself have, over a long period of months, come to know the defendant. He has been in my office time and time again. I have gotten to know his family, his mother, his sister, his

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grandmother. I know the whole family, and I can say to your Honor that in my own estimation I have confidence in this defendant. I would not make such a representation, and I hope the Court will so understand, if I did not feel so strongly about this young man. He has a reason why he did not want to be inducted.

The Court: Well, I am inclined, Mr. Faulker, to go along with you, for I must say that I got a very favorable impression of the defendant and his family from their testimony here. It is a pathetic if not tragic incident in the course of his life. It is not a pleasant part of it. But my own position and responsibility are here.

I think, Mr. Robinson, I will continue the bail status until the day of sentence. For one thing, it would be, I think, unnecessary to subject the defendant to the shock of remand at this particular time.

Mr. Faulkner, though obviously I keep an open mind on this, I think if you tell me on the day of sentence that there is an appeal I think we will have to discuss very seriously whether there won't be a remand on the day of sentence.

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I say that, Mr. Faulkner, largely because after reading the cases and doing the work that I have, and with the greatest respect for your talent and ability and your memorandum and your trial of the case have been highly skillful and professional, I honestly don't see any good ground for appeal. If you could show me that there is, I would be disposed to consider bail. But we will cross that bridge when we come to it. But I wouldn't want Mr. Sandbank or his family or you to be surprised on the day of sentence if a remand were to be ordered.

Mr. Faulkner: I have acquainted him with that.

The Court: We are speculating now. I wanted to give you an opportunity to hear what the Court feels as to bail, and we needn't speculate about that now. I am only saying this because I don't want a young man like this defendant to be startled if he faces a remand on the day of sentence.

Mr. Faulkner: No. As a matter of fact, I acquainted him with the possibility that this might even happen today.

The Court: No. I don't believe he is going to run away from these proceedings.

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Mr. Faulkner: I don't think so.

The Court: At any rate, I am going to take a chance on him.

Mr. Robinson: I would ask that he be restricted to the Southern District of New York, and I would further inform this Court that the first I found out that Mr. Sandbank was going to refuse to submit to induction on January 3, 1968 was a call from the press saying, "Where is the hearing going to be held?" He went so far, or

someone did, as to call the news media and say, "I am refusing to submit to induction". That is the first I heard of it—after refraining, the FBI, from arresting this man and issuing a complaint, which we probably had the duty to do.

The Court: Well, Mr. Faulkner, you appreciate that whatever happened in the past has happened, but I certainly don't want any efforts on the part of this defendant to gain publicity. I look with great disfavor on that.

Mr. Faulkner: The fact is, your Honor, that there has been no press coverage in this case. If the defendant was anxious for any kind of publicity or press coverage, this room could have been crowded

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during the day of the trial and certainly today.

The Court: I am not assuming that there will be any misbehavior of any sort.

Now, Mr. Faulkner, is it any hardship if the defendant observes the bail limits within the Southern District?

(Mr. Faulkner confers with the defendant.)

Mr. Faulkner: Will your Honor consider extending that to Suffolk County, including Suffolk County?

The Court: Mr. Robinson, that is in the Eastern District.

Mr. Robinson: I have no objection, your Honor, providing he goes there for some good purpose.

Mr. Faulkner: Well, if the Court wants to hear about it, the fact is that the defendant has a place at Moriches Beach in Suffolk County, where he goes on week ends.

The Court: All right. The Eastern District and the Southern District are the limits of the defendant's bail. That is understood.

Mr. Faulkner: Thank you.

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

Before:

LUMBARD, *Chief Judge,*
KAUFMAN and HAYS, *Circuit Judges.*

PER CURIAM:

Although this case was affirmed in open court, we believe it desirable to state briefly our reasons for that action.

Arnold G. Sandbank appeals from a judgment of conviction after trial before Judge Wyatt, sitting without a jury, for failure to report for induction into the military on July 26, 1967, and for failure to submit to induction on January 3, 1968. He was sentenced to three years on each count, the sentences to run concurrently.

Sandbank contends that he was deprived of his liberty without due process of law because he was not able to contest the denial of his request for a 1-O deferment as a conscientious objector after his induction notice was issued. A registrant may have his application for conscientious objector status considered by the Local Draft Board even after the induction notice is issued provided he raises his claim promptly after it matures. *United States* v. *Gearey,* 368 F. 2d 144, 150 (2d Cir. 1966). The Draft Board must reopen the case only if the registrant has made out a prima facie case, based on objective facts, that he is entitled to be reclassified. *United States* v. *Gearey,* 379 F. 2d 915, 922 n. 11 (2d Cir. 1967). See *United States* v. *Nugent,* 346 U. S. 1 (1953). The Selective Service regulations require that

before the Local Draft Board may reopen the case it must find that there has been a change in status resulting from circumstances over which the registrant has no control, subsequent to issuance of his induction notice. 32 C. F. R. §1625.2.

Sandbank claims that §1625.2 does not apply in his case since the induction notice in question was cancelled by officials at the induction center. We believe, however, that there is sufficient evidence to conclude that the order was merely postponed rather than cancelled. Nor has Sandbank shown that his claim to conscientious objector status matured after the induction notice was issued. *United States* v. *Gearey,* 368 F. 2d 144, 150 (2d Cir. 1966). He bases his claim on his parochial school training, and states that he has held his beliefs since the age of seven. Further, although Sandbank has had numerous appeals on various grounds since reaching his eighteenth birthday, when his claim to conscientious objector status could have been fairly heard, he never mentioned these beliefs or his alleged pacifist training until after receipt of the induction order which was approximately three years later. In sum, Sandbank has failed to make a prima facie case demonstrating that he is entitled to reclassification.

Sandbank also asserts that the court below should have directed a judgment of acquittal by reason of the government's failure to show as part of its case in chief that he was called up for military duty in the proper order. He contends, relying on *United States* v. *Lybrand,* 279 F. Supp. 74 (E. D. N. Y. 1967), that such affirmative proof is an essential element of the government's case. We believe there was adequate evidence to support Judge Wyatt's finding that Sandbank was called in proper order. Moreover, we do not agree with the District Court's conclusion in *Lybrand.** We are of the view that the better rule is

* The district judge decided in *Lybrand* that the government was required to prove as part of its direct case that the call-up of the registrant was not out of turn, but in regular order. This holding conflicts

(footnote continued on next page)

to require the registrant to show that the call up was invalid as part of his defense with the right to the government to rebut such evidence. *Lowe* v. *United States,* 389 F. 2d 51 (5th Cir. 1968); *Greer* v. *United States,* 378 F. 2d 931 (5th Cir. 1967).

Affirmed.

(footnote continued from previous page)

with the well-established presumption of regularity that attaches to official proceedings and places an unnecessary additional burden on the government. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14-15 (1926); *Ross* v. *Stewart* 227 U. S. 530 535 (1913); K. Davis, Administrative Law Treatise §11.06 (1958). While we are fully cognizant that this is a criminal case and accordingly we hesitate to presume a vital element of the proof, applying the presumption here results merely in permitting the government to present its case in chief free of a technical nicety. The defense may easily put this detail in issue. Assuming *arguendo* that proof of an improper call-up order would constitute a valid defense, we merely decide that the government need not take the initiative in raising the issue. An analogy may be drawn to a defense of insanity; although it is an essential element of criminality that the perpetrator must have acted with a sane mind, the government need not establish sanity as part of its case in chief in every prosecution.

Moreover, we note that even if the court had properly concluded that the government was required to establish as part of its case that Lybrand was called in regular order, the better practice would have been to reopen the case for this easily supplied and technical proof rather than to grant a motion for a judgment of acquittal. But the judge denied the United States Attorney's request to reopen the case. He grounded his ruling on the fact that the government had been given notice by the defense that it would press the issue. But this was a relatively novel question; only one unreported district court case had previously imposed this duty on the prosecution. *United States* v. *Franklin Howard Rhodes,* Crim. No. 41,112 (N. D. Cal.). Thus, if the government did introduce evidence relating to the order of call as part of its case in chief, it would have been put in the quandary of conceding the validity of *Rhodes* for this and all [illegible] prosecutions. Because precedent was so heavily in its favor, the government could reasonably have expected that a determination on the law would be made in a way that would not oblige it to make a "do or die" choice before the legal question was resolved as to the manner in which it would present its case. Directing a verdict of acquittal here completely foreclosed any remedial proof. Furthermore, since *Lybrand* was a nonjury case, the additional evidence could have been supplied without undue inconvenience to the court.

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of October one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARNOLD GEORGE SANDBANK,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 784

ARNOLD GEORGE SANDBANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 48-50) is not yet reported. The opinion of the district court (Pet. App. 32-47; Tr. 195-216),[1] is not yet reported.

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[1] "Tr." designates the trial transcript on file with the Clerk of this Court. We are also filing herewith petitioner's selective service file, which was received in evidence at the trial (Govt. Ex. 1-137; Tr. 16-18).

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1968 (Pet. App. 51). The petition for a writ of certiorari was filed on November 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was continuously subject to a valid order to report for induction.
2. Whether in the circumstances of this case, the local board properly refused to reopen petitioner's selective service classification.
3. Whether the government proved that the registrant was called in proper order.

STATEMENT

Petitioner was indicted on three counts in the Southern District of New York for his alleged failures to report for induction into the armed forces on October 26, 1966, and July 26, 1967, and his alleged failure to submit to induction on January 3, 1968, all in violation of 50 U.S.C. App. 462(a) (Tr. 3-4). After waiving his right to a jury (Tr. 7-8), he was tried and convicted of failure to report on July 26, 1967, and failure to submit on January 3, 1968; he was acquitted of failure to report on October 26, 1966 (Tr. 195; Pet. App. 32). On June 5, 1968, petitioner was sentenced to concurrent three year terms of imprisonment on the two counts (Tr. 230). The court of appeals affirmed the conviction in open court (Pet. App. 48).

Petitioner (then eighteen years of age) registered with local board No. 23, Bronx, New York, on December 3, 1963 (Tr. 19; G. Ex. 1-A). A few days later, he affirmatively stated in his classification questionnaire that he was making no claim for deferment as a conscientious objector (G. Ex. 2, p. 4; see Pet. App. 33). On June 2, 1965, he was classified 1-A and, on the following day, a notice advising him of this classification and of his right to appeal was mailed to him (Tr. 20-21, see also Tr. 23).

Petitioner's first physical examination, in October, 1965, resulted in his reclassification as 1-Y (not presently fit for military service subject to future reexamination) because of a hyperthyroiditis condition (Tr. 21). A second examination led to his reclassification as 1-A in June 1966. Petitioner had sought to appeal this classification prematurely, when informally notified of it in May; as a result, the medical evidence was again evaluated; in September, 1966, petitioner was formally retained in his 1-A classification and notified of this determination (Tr. 21-24). Petitioner did not seek to appeal the September or June classifications within the Selective Service System (Tr. 21-31), and on October 13, 1966, the local board mailed petitioner an order to report for induction on October 26, 1966 (G. Ex. 59; Tr. 31-32).

At some subsequent time, but before October 26, 1966, petitioner's mother complained to a Congressman and the Surgeon General that petitioner was going to be inducted despite his history of hyperthyroidism. After receiving a telegram from the Congressman stating that her son would not be inducted

on the 26th but "must report for physical examination * * * as scheduled" (D. Ex. A; Tr. 122-123), she telephoned the induction center early on the morning of the 26th and stated that her son would not report, as his induction had been cancelled (see Tr. 87, 136-141, 114-119, 121-123, 152-154). Petitioner failed to appear at the induction center on that day (Tr. 32-33).

The handwritten notation "canc" appeared next to petitioner's name on one copy of the "delivery list" sent by the local board to the induction station to indicate which registrants were to report for induction on October 26 (Tr. 45, G. Ex. 139, Pet. App. 31). The clerk of another local board in New York City, who testified as an expert on local board procedure (Tr. 52-53), stated that such a notation would not be made by the local board (Tr. 46, 49). Godofredo LeBron, the employee of the induction center who handled the October 26 delivery list, testified that all other notations on the list were in his handwriting but that this particular notation was not (Tr. 69-70, 74-75). He stated that he did not know who had made this entry; that he always received an instruction from the local board before he recorded an entry that an induction was cancelled; that he had not received any such instruction in this case; and that he had no authority to cancel petitioner's induction on his own (Tr. 64, 69-70, 79, 82-84). The other copies of the list do not have the "canc" mark, but bear Mr. LeBron's notation that petitioner had failed to report (G. Exs. 140-141; Tr. 65, 71). Mr. LeBron gave the list to an Army officer at the center (Tr. 81). That officer did not know how the notation "canc" was entered, although any of sev-

eral persons at the center could have written it in (Tr. 98-100). Mr. LeBron also testified that he was advised on the afternoon of October 26 by military personnel at the induction center that petitioner was not to be inducted that day but was to be referred for a complete medical processing (G. Exs. 85-88, 142; Tr. 67-68).

In accordance with a determination made by the Surgeon General's office (Tr. 115-116, 121-123), arrangements were made for petitioner to take a full medical examination at St. Albans Naval hospital on November 21, 1966 (G. Ex. 87; Tr. 68, 90-91, 155-156). Meanwhile, the local board advised petitioner by a letter of November 15 that the October 26 order to report for induction remained in full force and effect, and that he should report for induction on November 23, 1966 (G. Ex. 51). Petitioner completed all but one of the tests at St. Albans on November 21, and was scheduled to return on November 28 (G. Ex. 87; Pet. App. 36-37). He reported for induction on November 23, but was held over, since the tests had not been completed nor his medical acceptability determined (G. Exs. 42, 136; Tr. 109-112, 158).

On November 25, petitioner wrote to his local board. He characterized himself as a "medical holdover," advised that he now considered himself a "C.O.," and requested a conscientious objector form (G. Ex. 42; Pet. App. 37). Petitioner did not appear at St. Albans for his final test on November 28 (G. Ex. 84). Form 150, the conscientious objector form, was mailed to petitioner December 9 (Tr. 33-34, 57); on December 19, it was returned completed to the Board and on the

same day petitioner reported for his final thyroid test at St. Albans (G. Exs. 94-95, Tr. 34, 57-58; Pet. App. 37-38).[2] In the form, petitioner claimed exemption from both combatant and non-combatant training (Tr. 34, 57-58; Pet. App. 37-38), and stated, *inter alia*, that he believed in a "Supreme Being" and that his belief was "in the brotherhood of all man and which takes in a respect for all life" (G. Ex. 37; Pet. App. 38).

On January 3, 1967, petitioner requested an appearance before the local board in connection with this claim. The board consulted the Selective Service's legal division, which advised it to grant petitioner an interview but to "remind him that he is still under an induction order having been found fully acceptable by the Armed Forces and the only purpose of the meeting will be to discuss his request for I-O" (G. Ex. 32); it further advised that the board could reclassify petitioner only if it found a change of status resulting from circumstances beyond his control, in view of the outstanding induction order, but that if the board found him to be sincere it could recommend that the New York City Director of Selective Service reopen the case under 32 C.F.R. 1625.3 (*ibid.*). Petitioner was then granted an "interview," which was set for April 11 (G. Ex. 29).

The board's minutes of the interview (G. Ex. 30; Tr. 34-35) indicate that petitioner was "conscientiously opposed to taking a life." This attitude was "not

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[2] The tests revealed that petitioner was fit for induction, as he was formally notified on January 17, 1967 (G. Exs. 33, 70).

connected with any religious belief"; petitioner "felt [this attitude] in [the] last year." The board then explained 1-AO classification (military service as a non-combatant), and petitioner said he would go to national headquarters the next day and change his request to encompass this classification. The board indicated that it would "go along (Vote 5 to 1)" (*ibid.*). On April 17, however, the board received a letter in which petitioner said that he had learned that if classified 1-AO he would probably have "to engage in activities of military nature * * * directly assisting the military effort. This," he said, "runs completely counter to my religious and philosophical training since childhood, in both my church and home * * *, and my conscience refuses to accept this classification. * * * I would not object to participate in work of a completely nonmilitary nature" (G. Ex. 28; Tr. 36-38).

The local board then invited petitioner for a second interview, which was ultimately held on June 27, 1967 (G. Exs. 22-24, 26). According to the board's notes, he stated that religious training or belief was not "the primary * * * or a really important factor" in his opposition to "violence in any form,"[3] and that "[h]e felt this way for a long time before he got his Induction Notice [but] * * * did not bring it up because he thought or hoped it would not be necessary." The board concluded that "he is sincere, but also finds that his beliefs are primarily based upon his philosophy of morality and somewhat on the political philosophy of

[3] Petitioner reaffirmed this statement at his trial (Tr. 120; 169-170).

his family * * * [and thus that] he does not meet the legal requirements for a 1-O classification. * * * In any event the registrant had these convictions long before he received his notice of induction and he so states. There have arisen no circumstances beyond his control which would impel the Board to recommend cancellation of his induction" (G. Exs. 22-23; Tr. 39-40).

On June 29, 1967, the local board notified petitioner by letter that his classification would not be reopened and that he remained subject to continued processing (G. Ex. 21; Tr. 162). He promptly sought to appeal what he characterized as a "decision classifying me as 1A" (G. Ex. 20). He was then advised that his appeal was not timely (see G. Exs. 12, 15, 19), and was ordered to report for induction on July 26, 1967 (G. Ex. 17).[4] He failed to report as ordered. On January 3, 1968, he reported to the induction center, where he was given a physical examination. There was no evidence of any thyroid condition and he was found acceptable. He then refused to submit to induction (G. Exs. 76, 133; Tr. 43-44, 47, 94-96).

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[4] The local board clerk who testified as an expert on Selective Service practice stated that this order did not cancel the October 1966 order. She stated "It can be postponed; it can be rescheduled, but that first order applies" (Tr. 41). In response to the trial court's inquiry as to the effect of the July 1967 order to report, government trial counsel stated that this order was sent to make sure that petitioner knew of his continuing duty to report, in light of the delay occasioned by the examination into his physical condition and objector claim. It was sent "in furtherance of that first order" and "did not have the effect legally or factually of cancelling the first order" (Tr. 42-43).

ARGUMENT

Since the effect on a registrant's classification of a local board's examination of claims for exemption made after the mailing of an induction notice is among the questions presented by this case, this Court may wish to defer consideration of this petition pending its consideration and decision in *DuVernay* v. *United States*, No. 814, this Term, certiorari granted, December 9, 1968, in which this question was also raised. The government believes, however, that the courts below correctly held that the the local board was not required to reopen and did not reopen petitioner's classification.

1. Unless, as petitioner argues, the October 26 order to report for induction was no longer in force when his conscientious objection claims were presented to the local board, it is clear that he was not entitled to reopening of his classification. Selective Service Regulations provide in pertinent part, 32 C.F.R. 1625.2, that the "classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control." The courts of appeal have unanimously held that this rule is a valid and reasonable means of preventing disruption of the administration of the Selective Service System by the belated assertion of pre-existing claims, and is not in derogation of the statutory exemption of conscientious objectors (50 U.S.C. App. 456(j)). See *e.g.*, *Davis* v. *United States*, 374 F. 2d 1, 4 (C.A. 5);

United States v. *Al-Majied Muhammad*, 364 F. 2d 223 (C.A. 4); *United States* v. *Taylor*, 351 F. 2d 228, 230 (C.A. 6); *United States* v. *Beaver*, 309 F. 2d 273, 276 (C.A. 4), certiorari denied, 371 U.S. 951; *Keene* v. *United States*, 266 F. 2d 378, 383-384 (C.A. 10); *United States* v. *Geary*, 368 F. 2d 144, 149 (C.A. 2). As the board found and petitioner conceded in his letter rejecting the possibility of 1-AO classification, the asserted grounds of petitioner's conscientious objector claim were in existence long before he was sent the October 26, 1966 notice to report for induction. There is thus no assertion that petitioner's conscientious objection did not "crystallize" or "mature" until after he had received his induction notice, in contrast to cases discussed in our brief in opposition filed in *Hoapili* v. *United States*, No. 663 Misc., this Term; thus, if the October 26 order to report was still outstanding, reopening of the classification was properly denied.

So far as the October 26 order's continuing validity presents a question of fact, it plainly does not warrant this Court's review. Both courts below found sufficient evidence to conclude that the order was merely postponed, rather than cancelled, when the Surgeon General agreed to delay petitioner's actual induction in order to examine further petitioner's medical claims (Pet. App. 40, 41, 49). The local board acted at all times in a manner consistent with the view that the order to report was postponed, not cancelled—as when it termed its meetings with petitioner "interviews" rather than "appearances in person," which are permitted only within 30 days of a notice of classification,

32 C.F.R. 1624.1(a). In corresponding with each other after October 26, the local board and petitioner indicated their understanding that the order was still outstanding (G. Exs. 42, 43, 51).[5]

There is no basis for concluding that the order was cancelled or had lapsed as a matter of law. The actions of military authorities— such as the Surgeon General, or personnel at an induction station—in delaying or postponing the induction of a registrant have no legal impact on the validity of induction orders issued by the local board. It is only the local board itself which can issue or cancel orders to report for induction,[6] and it did not do so. Similarly, Section 1632.2(a) of the Selective Service Regulations, 32 C.F.R. 1632.2(a), did not have the effect, urged for the first time by petitioner in this Court, of automatically cancelling the order to report once 120 days had elapsed after October 26. Although that regulation does limit the period during which a local board may grant postponement to

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[5] This was also the view of National Selective Service Headquarters in its February 14, 1967 communication with the local board concerning this case (G. Ex. 32).

[6] Thus, the governing statute provides that the civilian operated local board shall carry out the function of "registration, examination, classification, selection, assignment, [and] delivery for induction" of registrants. 50 U.S.C. App. 460 (b)(3) (Supp. III). The Selective Service regulations provide for cancellation of an outstanding order to report for induction where the local board reopens a classification (32 C.F.R. 1625.14). The local board may do so of its own accord in the circumstances set forth in 32 C.F.R. 1625.2; see also 32 C.F.R. 1625.3(b). It must so do where such action is requested by the State Director of Selective Service or the Director of Selective Service (32 C.F.R. 1625.3(a)).

120 days, it authorizes the Director of Selective Service to "postpone the induction of a registrant until such time as he may deem advisable." Within 120 days, the local board had contacted National Headquarters and had been advised to grant petitioner the interview he requested but to treat him as continuing to be under the October 26 order to report. Thus, if the delay in petitioner's case was a Section 1632.2 "postponement," it does not follow that petitioner's induction was not validly postponed for the full duration. At all events, it would appear that 32 C.F.R. 1632.2(a) is simply a method of prohibiting local boards from showing favoritism to particular registrants by granting them continuous postponement of their induction. Non-compliance by a local board with this internal mechanism of assuring even-handed administration of the Selective Service System should not be the basis for a claim of error by a registrant—particularly by one who benefited from the delay. The delay not only afforded petitioner several additional months free from his military obligations, but afforded him the opportunity to have his untimely claim to 1-O status considered by his local board—a claim which on no different evidence he had affirmatively disclaimed some three years before (see G. Ex. 2, p. 4). Finally, 32 C.F.R. 1632.2(d) affirmatively states that a "postponement of induction shall not render invalid the Order to Report for Induction * * * but shall operate only to postpone the reporting date * * *."[7]

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[7] While Section 1632.2(d) goes on to say "and the registrant shall report on the new date without having issued to him a new Order to Report for Induction", that Section is not

2. The local board's consideration of petitioner's claim did not constitute a reopening-in-fact of his classification, from which he would have been entitled to appeal. The local board simply examined petitioner's claim to determine if he qualified for reopening under the standard set by 32 C.F.R. 1625.2, and determined that he did not. The local board's indication after the April 27 meeting that it would "go along" with a 1-AO classification if Selective Service Headquarters directed was merely a recognition that there was no factual basis on which the Board itself could act.

Indeed, on this record the same finding would have been required even if petitioner had not been subject to a valid order to report for Induction. Where a claim for exemption is made *before* a notice of induction is mailed, Section 1625.2 states that the local board may reopen a registrant's classification if the claim states facts "which, if true, would justify a change * * *". But, as shown in the Statement above, petitioner repeatedly stated that his opposition to war and taking life was not importantly related to any religious belief. Compare *United States* v. *Seeger*, 380 U.S. 163, 184-185. Thus, he failed to demonstrate

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rendered inapplicable to this case because petitioner was mailed another order to report in July, 1967. The only trial evidence introduced as to the effect of the July order was the testimony of the government's witness on local board procedure that the "first order [still] applies" (Tr. 41). Cf. *Keene* v. *United States*, 266 F. 2d 378, 384 (C.A. 10). Moreover, even if the July 26, 1967 order was a new order which technically cancelled the October 26 order, it was mailed on July 11, 1967, two weeks after the local board had refused to reopen (G. Ex. 22) at a time when the October 1966 order was still in force.

a basis for reopening his classification even under the pre-induction standard.

3. Petitioner asserts that the government must prove in its case-in-chief that the person refusing induction was called in proper order. The court of appeals ruled that, as in the case of the insanity defense, the question must be put in issue by the defense. This ruling is clearly correct and is in agreement with similar rulings in the Fifth Circuit. See *Pigue* v. *United States*, 389 F. 2d 765 (C.A. 5) and cases there cited. There is no conflict among the circuits. Indeed, as the court below itself noted, the ruling was not required by the case, since the record adequately supports the finding made by the trial judge that petitioner *was* called in proper order (Pet. App. 41, 49, and see Tr. 45-46). The court of appeals was simply availing itself of the opportunity to express its disapproval of another district court judge's ruling in another case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied. In light of the pendency of *DuVernay* v. *United States*, No. 814, which may control one of the issues presented here, the Court may prefer to defer consideration of the present petition.

Respectfully submitted.

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